



State of New Hampshire
DEPARTMENT OF ENVIRONMENTAL SERVICES

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PLEASE NOTE: Effective September 1, 2003, the street address is 29 Hazen Drive.

In re: Donald Lee
5 Ray Avenue
Beverly, MA

Docket No. WD 2002-15

October 6, 2003

Decision on Intervenor's Motion for Reconsideration of Amended Administrative Order

On June 5, 2003, the Department of Environmental Services ("DES") issued Notice of Decision on Motion for Reconsideration ("the Decision") to Donald Lee relative to Administrative Order No. WD #2002-15 ("the Order"). The Division affirmed the findings of the Order but determined that the Order should be amended. The Order was amended on June 20, 2003 in accordance with the Decision as follows:

1. The deadline specified in E.1 for Mr. Lee to remove the breakwaters from his property is changed from June 1, 2002 to August 1, 2003, so item E.1 now reads as follows:

1. By August 1, 2003, completely remove both the Lot 26 Wall and the Lot 25 Wall, with the following conditions:

- a. Both walls to be removed from DES jurisdiction.
- b. Any equipment used for removal to be operated landward of the high water mark of Lake Ossipee.
- c. Siltation and erosion controls shall be installed to prevent any water quality degradation.
- d. Photos documenting removal to be submitted within 10 days of completing the removal.

2. Items E.3 and E.4 are replaced with the following:

3. a. By August 1, 2003, submit a plan to remove enough material from the Lake adjacent to where the walls were constructed to breach the sandbar and reestablish flow through the area. Include in the plan a time table for the removal, which shall

occur during low flow/ draw-down conditions no later than fall/winter 2003.

b. Implement the plan as conditioned and approved by DES.

4. a. Hire a hydrogeologist or sedimentologist acceptable to DES to monitor the area for a period of five years from the date the walls and sandbar material are removed and to submit annual reports to DES. The reports shall include photographs and charts or graphs representing baseline conditions and the current year's conditions in a form that allows reasonable comparison, together with the consultant's assessment of whether sedimentation in the area is decreasing at a reasonable rate.

b. If after three years of the monitoring period the consultant concludes that sedimentation is not decreasing at a sufficient rate to prevent sandbar growth, submit a plan to remove additional material from the Lake, including a time table for the removal, and implement the plan as conditioned and approved by DES.

Ossipee Bluffs Association ("OBA") filed Intervenor's Motion for Reconsideration, dated June 25, 2003, requesting DES to reconsider its decision to amend the Order ("Motion"). Specifically, OBA asserts that the basis for remedial plan set forth in the Decision is not supported by the record; that the remedial plan will not prevent continued sandbar growth or other necessary objectives; that the remedial plan is vague and unenforceable and will delay effective remediation of the site; that the Decision limits Mr. Lee's responsibility for excess sedimentation by requiring only the prevention of future sandbar growth and absolving him of responsibility for existing deposition; and that the Decision reverses the Administrative Order's finding and determination of legal causation.

OBA also submitted two conceptual remedial proposals prepared by its consultant, R.W. Gillespie and Associates, which OBA contends would remediate the damage to the Lake. One of the proposals is estimated to cost in excess of \$500,000, while the other is estimated to cost at least \$200,000.

The goal of the Order is to bring Mr. Lee's property into compliance and to remove that portion of sediment that can reasonably be attributed to the breakwaters, not to "...restor[e]

Ossipee Bluff Association's waterfront..." as asserted in the Motion. It is clear from photographs that the delta was forming prior to the walls being built, from which it is reasonable to infer that the OBA property may have been impacted by the relocation of the Lovell River regardless of whether Mr. Lee constructed any walls. That is, the evidence is insufficient to support a finding that the sole cause of any impacts to the OBA property is Mr. Lee's walls.

The Amended Order does not limit Mr. Lee's responsibility to future sediment deposition. Rather, it is clear that his walls are not the sole cause of sediment accretion, so the Order recognizes that he should not be solely responsible for removing all of the accretion. The requirement that Mr. Lee remove sufficient material to reestablish flow is more reflective of his liability than the original Order.

The remedial plan identified in the Decision is supported by the record. Before the remedial plan is implemented, it must address the objectives stated in the Order and be approved by DES. DES explicitly retained the right to add conditions to its approval.

On reconsideration, the burden is on the requestor to show cause as to why the decision should be changed. Here, OBA has not demonstrated that the Decision is unlawful or unreasonable, therefore, OBA's request for relief is denied.

SO ORDERED.



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Harry T. Stewart
Director, Water Division